

FEDERALIST NO. 51

The Message: The Constitution will create three separate branches of government. Because of the unique relationships each branch will have with the people, and with each other, this system will shield the nation from tyranny.

Original Quote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Relevance to Today: Whenever Republicans or Democrats control the House, Senate, and presidency (as both George W. Bush and Barack Obama did at one point) they've faltered and abused their power. Ultimately the American people exerted their will by diluting the hold on power that the majority party had.

Original Quote: "We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."

Relevance to Today: Few acts in Washington sparked more outrage around the country than the passing of the Patient Protection and Affordable Care Act. Americans took to the streets . . . and to the ballot box, and elected representatives who promised to overturn the legislation. A newly Republican House then immediately began finding ways to legally undermine the law. Lawyers and attorneys general from around the country challenged the constitutionality of the legislation and, in the end, took it to the Supreme Court. Politics can be ugly, but the Constitution guarantees that the people have the ultimate power as "sentinels" over public rights—it's just up to us to use that power.

NUMBER 51

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

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For the New York Packet: Tuesday, February 5, 1788
The Constitutional Convention and the New Federalism

How will we maintain, in practice, the necessary separation of power between the Branches of government as laid out in the Constitution?

Since all the provisions that describe each separate Branch are merely surface-level solutions, the defect must be corrected by arranging the interior structure of the government in such a way that the mutual relationships between each Branch will turn out to be the way in which each Branch is kept within its own appropriate limits. While I won't be presumptuous enough to attempt to fully develop such an important idea in this paper, I will hazard a few general points that will hopefully shed some light on the subject and enable us to correctly judge the principles and structure of the government proposed by the Convention.

In order to build a strong foundation and ensure that the powers of each Branch will be exercised freely and separately, powers that everyone, on some level, admits are essential to the preservation of liberty, it is clear that each Branch should have a will of its own. Therefore, they should be structured in a way that the members of each Branch will play as small a role as possible in the appointment of the members of the other Branches. However, if we strictly followed this principle, then it would require that all appointments to the supreme Executive, Legislative, and Judicial Branches should come from the same fountain of authority, and through channels that have absolutely no communication with each other; in other words, the authority of the People.

It may be the case that this could be accomplished more easily than it may appear. Since some additional difficulties and expenses will crop up in the actual execution of such a plan, we must accept that, from time to time, we will depart from the principle of separation of powers. For example, it might be inadvisable to insist on strictly adhering to the principle as far as the makeup of the Judicial Branch is concerned. The reasons for this are: First, since it is essential that each member of the Judicial Branch have unique qualifications, our primary interest is to find a method of appointment that will do the most to ensure we appoint judges with those qualifications; and second, because judges have life-long terms in office, their sense of dependence on the authority that appointed them in the first place would be completely destroyed if the Judicial Branch were kept completely separate and distinct.

It is equally obvious that the officials of each Branch must depend as little as possible on the other Branches for their salaries. If the President or the judges absolutely depended on Congress to determine their salaries, then their independence to everything else would be mere mockery.

What will ultimately provide the greatest security against the gradual accumulation of the powers into a single Branch will be giving everyone who actually administers the different Branches the constitutional ability, as well as the personal motives, to resist the invasions of the others. The provisions in the Constitution that allow each Branch to defend itself must (as always) be equal to the risk of one Branch being attacked by, or attacking, another. Ambition must be made to work against ambition, and the interests of each man must be connected with the constitutional rights that his position will afford him. Perhaps it is a reflection on human nature that such devices should be necessary in the first place to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary, and if angels were to govern men, then neither external nor internal controls on government would be necessary. In framing a government administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed, and in the next place oblige it to control itself. Without a doubt, the primary control on the government will be its dependence on the People, but experience has taught mankind that other precautions will be necessary as well.

The idea of making up for man's lack of virtue by putting his interests in opposition to those that rival his own is not a new one. This notion can be seen throughout all of the private and public affairs of humanity. Specifically, we see this idea on display in every subordinate distribution of powers (such as in a bureaucracy), where the goal is always to divide and arrange each department in such a way that each acts as a check on the other. This way the private interests of every individual may serve as a lookout of sorts for the rights of the public. These wise inventions are as necessary in the distribution of the supreme powers of the state.

It isn't possible to give each Branch an equal power of self-defense, since in republican government the legislative authority is inevitably the strongest. The way to make up for this inconvenience is to divide the Legislature into different Houses and to disconnect them from each other. This can be accomplished by using different methods of election and assigning each House its own unique powers and procedures. It may even be necessary to provide more safeguards against dangerous invasions of power. Since the great importance and strength of the legislative authority requires that it be divided into separate Houses, then the natural weakness of the executive authority may actually require that *it* be strengthened.

At first glance, it may appear that giving the Executive an absolute veto power on any law the Legislature passes would be a smart and natural idea. But perhaps such a power would be neither completely safe nor, on its own, adequate. On ordinary occasions, such a power may not be used with enough firmness, while during extraordinary times it might be treacherously abused. Isn't there some way to fix the difficulties involved in giving the Executive such an absolute and final veto power? Could it be fixed by a spelled-out connection between the weaker Executive Branch, and the weaker House of the stronger Congress, and in such a way that Congress could be made to respect the constitutional rights of the President and, at the same time, remain confident enough in its own rights?

If these principles (which I am convinced are correct) were applied as a standard to the state constitutions and to the proposed Federal Constitution, I believe that, even if the Federal Constitution didn't perfectly comport with them, the state constitutions would be infinitely less capable of passing the same test.

Furthermore, there are two considerations that apply espe-

cially to the Federal system of America, and will allow us to look at our system from a very interesting point of view.

First, in a single republic, all the power that is surrendered by the People is submitted to the administration of a single government, and abuses of that power are protected by dividing that government into distinct and separate Branches. In the compound republic of America, the power that is surrendered by the People is first divided between two distinct governments (state and Federal), and then the portion that each has for itself is further subdivided into distinct and separate Branches. As a result, the rights of the People are provided with double security, since the two different governments control each other, and will at the same time control themselves.

Second, it is important in a republic to not only protect society against the oppression of its rulers, but to protect each part of society against the injustice of the others. Different classes of citizens have different interests, and if some common interest were to unite a majority of citizens, then the rights of the minority would be at risk. There are only two ways to protect against this evil: first, by creating within the community itself a will or authority that is independent of the majority, or in other words, society itself (i.e., such as a monarch); or second, by having so many different types of citizens within society it would be extremely unlikely, if not completely impractical, for a majority of citizens to ever combine together for the sake of oppressing their own fellow citizens.

The first method is common to all governments that have a hereditary or self-appointed authority (i.e., monarchies). This security is at best a precarious one, since a power that is independent of society supports the unjust views of the majority as much as the rightful interests of the minority, or better yet, may possibly turn against both of them. The second method, however, will be

exemplified by the Federal Republic of the United States. While the authority of this government will be derived from and be dependent on society, the society itself will be broken into so many parties, interests, and classes, that individual and/or minority rights will be in very little danger against any sinister alliance on the part of the majority.

In a free government, the security for civil rights must be the same as that for religious rights; the security for the first will be provided for by society's great variety of interests, just as the security for the second will be provided for by society's many religions. The amount of security for each depends on the number of interests and religions, which is itself dependent on the size of the country, and the number of people who will live under the same government.¹

From this point of view, it seems that any sincere friend of republican government has good reasons to support the idea of a well-constructed Federal system. It shows that, in this country, oppressive majorities will be easier to form in exact proportion to how much the territory of the Union decreases. The Union becoming more diverse and more divided into different confederacies or states is the best possible security that can be had under the republican form of government for the rights of every class of citizen. As a result, the stability and independence of some Branch of government (the only other security for such rights) would have to be proportionally increased.

Justice is the goal of government, it is the goal of civil society, and it has, and always will be, pursued until it is either obtained, or until liberty is lost in its pursuit. In a society in which the stronger faction can easily come together to oppress the weaker, it can be said that society anarchy is just as prevalent as it is in nature,

1. Refer to Federalist 10.

where the weaker species is always in danger from the stronger. And since, even in a state of anarchy, the stronger individuals may wish to submit to a government that protects the weak as well as themselves (because of the uncertainty of their own safety and well-being), in the same way, under a Federal government, the more powerful factions or parties will be gradually persuaded by the same motive to wish for a government that protects all parties, both the weak as well as the powerful.

It is almost certain that if the state of Rhode Island were to be separated from the Union and left on its own, individual rights under a government that was so confined would become so insecure (because of the oppressions of the majority) that a power completely independent of the People would be called on by the very same factions whose own misrule had required such a power in the first place. However, in the immense republic of the United States, with its numerous and diverse interests, parties, and religions, the formation of a majority coalition throughout all of society would probably only happen if it were based on the principles of justice and the general good. And since under the system established by the Constitution the minority will be in less danger of being oppressed by the majority, there will be even fewer reasons to further protect the security of the minority by introducing into the government a will that was not dependent on the majority, or in other words, a will that was independent of society itself (i.e., such as a monarch).

Also, contrary to the opinions of some, it is just as certain that the larger the society, the more capable it will be of self-government (so long as it exists within a practical amount of territory). Fortunately for the *republican cause*, the amount of territory that has been deemed "practical" can be greatly enlarged by a wise modification and application of the *Federal principle*.

—Publius